

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VILLAGE OF MERRIMAC,

Plaintiff,

v.

EAGLES NEST ON LAKE WISCONSIN, LLC,

Defendant.

ORDER

12-cv-824-wmc

Defendant Eagles Nest on Lake Wisconsin, LLC, filed a notice of removal of this action from the Circuit Court of Sauk County of the State of Wisconsin. (Dkt. #1.) In its complaint, plaintiff Village of Merrimac seeks enforcement of various ordinances against defendant. Defendant filed a counterclaim pursuant to 42 U.S.C. § 1983, claiming that the ordinances at issue are unconstitutional. On the basis of this counterclaim alone, defendant erroneously purports to remove this action pursuant to this court's federal question jurisdiction. 28 U.S.C. §§ 1331, 1441.

Defendant does not argue -- and there is no basis for arguing -- that this court has original jurisdiction over plaintiff's complaint, either based on diversity of the parties or federal question. Rather, it is defendant's position that defendant's counterclaim which arises under federal law provides a basis for removal. Unfortunately for defendant, this is at odds with the law governing removal.

"[T]he propriety of removal depends on whether the suit -- as the plaintiff framed or easily could have framed it in the complaint -- would have been within the court's original jurisdiction at the time of the removal." *Fed. Deposit Ins. Corp. v. Elephant*, 790

F.2d 661, 667 (7th Cir. 1986). “That something happened later, such as the filing of a counterclaim based on federal law, does not make the suit removable.” *Id.* Accordingly, the court will *sua sponte* remand this case to state court, finding removal inappropriate.

ORDER

IT IS ORDERED that the clerk of the court is directed to remand this case to the Circuit Court of Sauk County of the State of Wisconsin and close this case.

Entered this 16th day of November, 2012.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge